

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

ALLIED MACHINERY CO., INC.,  
a Delaware Corporation,

Plaintiff,

vs.

Case No. 2005-578-CK

PGAM ADVANCED TECHNOLOGIES,  
a Michigan Firm, COLLINS AND AIKMAN  
CORP., a Michigan Firm, and PREMIER  
MOLD, a Michigan Firm,

Defendants.

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OPINION AND ORDER

This matter is before the Court on a motion for summary disposition, pursuant to MCR 2.116(C)(10), by PGAM Advanced Technologies ("PGAM").

I.

Plaintiff alleges that on or about September 1, 2004, it entered into an oral contract with PGAM under which it was to procure a buyer and sell certain equipment owned by PGAM in exchange for the payment of a commission. Further, plaintiff alleges that the parties discussed a sales strategy and pricing for 4 or 5 machines to be sold to Premier Mold ("Premier"). Plaintiff alleges that on or about September 15, 2004, it quoted prices totaling \$369,000.00 on its letterhead to Premier in accordance with the sales and pricing discussed with PGAM. However, plaintiff alleges that PGAM subsequently approached and sold the equipment to Collins and Aikman Corp ("Collins"), of which Premier is a subsidiary. In this regard, Plaintiff alleges that PGAM has refused to honor its demand for the payment of a \$40,000.00 commission.



Plaintiff has brought the following claims: Count I, breach of contract; Count II, misappropriation; and Count III, tortious interference with a contract. On June 2, 2005, an order for an administrative closing due to a bankruptcy stay was entered as to Premier and Collins.

## II.

In the motion at hand, PGAM contends that the alleged oral agreement was in contravention of the statute of frauds. Conversely, plaintiff maintains that the statute of frauds does not apply.

At the outset, the Court notes that PGAM moves only pursuant to MCR 2.116(C)(10), notwithstanding that the statute of frauds is specifically addressed under subrule (C)(7). Under the circumstances, the Court opines that it would be in the interest of justice to construe the motion as having been brought under subrule (C)(7) and will review it as such.

In considering a motion brought under subrule (C)(7), the Court must accept as true all of the plaintiff's well-pled allegations and construe them in the plaintiff's favor. *Hanley v Mazda Motor Co*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The Court must consider affidavits, pleadings, depositions, admissions, and documentary evidence to determine whether there is a genuine issue of material fact. *Id.* Summary disposition is inappropriate where a material factual dispute exists such that factual development could provide a basis for recovery. *Kent v Alpine Valley Ski Area, Inc*, 240 Mich App 731, 736; 613 NW2d 383 (2000).

The statute of frauds provides in pertinent part that:

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of \$500.00 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker... [emphasis added] MCL 440.2201.

As referenced above, the term "goods" is defined under the Uniform Commercial Code ("UCC") in part as:

(1) ...all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (section 2107). MCL 440.2105.

Further, MCL 566.132 states in part that:

(1) In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:

(a) An agreement that, by its terms, is not to be performed within 1 year from the making of the agreement.

\* \* \*

(e) An agreement, promise, or contract to pay a commission for or upon the sale of an interest in real estate.

After careful consideration, the Court is persuaded that PGAM has misplaced its reliance on MCL 440.2201 inasmuch as the alleged contract between the parties was actually one for services, rather than for "goods," as defined under MCL 440.2105. Moreover, the Court is convinced that the disputed contract does not fall within the parameters of MCL 566.132. There is no indication that the alleged agreement could not be performed within 1 year. MCL 566.132(1)(a). Likewise, the alleged agreement did not arise out of a commission for the sale of an interest in real estate. MCL 566.132(1)(e). In light of PGAM's failure to raise any statutory provision which would prohibit the contract in controversy, the Court determines that the entry of summary disposition would not be appropriate under MCR 2.116(C)(7). *Hanley, supra; Kent, supra.*

### III.

PGAM further asserts that a valid contract had never existed. However, plaintiff submits that the parties had entered into a valid contract under which plaintiff had rendered full performance.

Theodore J. Barrie ("Barrie"), plaintiff's president and owner, testified that he was a machine broker, which meant that he acquired and sold machinery. *See* Barrie's deposition at 5-6. He further indicated that he had 8-10 meetings with Eugene Schuster ("Schuster"), PGAM's president, regarding the sale of certain machinery and that he was to be paid a commission of almost 13½ %. *Id.* at 18. However, Barrie stated that there was no written contract between the parties regarding such commission. *Id.* at 30. He also testified that, to the extent there may have been a contract between the parties, it would have been non-exclusive. *Id.* In this regard, he defined the phrase "non-exclusive" as applying to a situation wherein "a seller broadcasts to maybe ten or twelve dealers the machinery he's got for sale and offers it to anybody who can sell it." *Id.* He acknowledged that PGAM could have sold the subject equipment to any company it wanted to and was not bound to sell it to Premier or Collins. *Id.* Additionally, he conceded that he never received an offer to purchase from Premier, Collins, or any other entity. *Id.* at 20.

Schuster testified as to the circumstances under which PGAM sold its equipment. Typically, a broker would approach him and indicate that he could sell a piece of equipment at a suggested price, at which point the broker would not yet know whether he had a buyer, but would subsequently search for one. *See* Schuster's deposition at 11. Prior to the time that Schuster met Barrie, he had a relationship with Mr. Fleming, the general manager of Premier, as well as with Kurian Pothen, Premier's vice-president of engineering, who was one of his best friends. *Id.* at 12. Schuster also stated that he had a conversation with Fleming on the floor

regarding excess equipment before Barrie became involved. *Id.* at 14. According to Schuster, Barrie made an unsolicited contact with PGAM. *Id.* at 21. Schuster had agreed to pay Barrie a commission in the event that Barrie sold the equipment. *Id.* at 24. However, Schuster directly sold the equipment to Premier/Collins. *Id.* at 35.

After carefully reviewing the totality of circumstances, the Court is satisfied that plaintiff would have been entitled to a commission only if plaintiff had sold the equipment, which it failed to do. Inasmuch as the parties allegedly had a non-exclusive agreement, at the most, PGAM was free to sell the equipment on its own, especially since PGAM's owner had a relationship with Premier's personnel prior to the time that Barrie had entered onto the scene. Accordingly, the Court is persuaded that PGAM is entitled to the entry of summary disposition in its favor pursuant to MCR 2.116(C)(10). *Smith, supra.*

IV.

For the reasons set forth above, PGAM's motion for summary disposition, pursuant to MCR 2.116(C)(7), is DENIED.

PGAM's motion for summary disposition, pursuant to MCR 2.116(C)(10), is GRANTED. Pursuant to MCR 2.602(B), a judgment shall enter that is consistent with this *Opinion and Order.*

In compliance with MCR 2.602(A)(3), the Court finds that this decision resolves the last pending issue. This case shall close upon the entry of judgment.

IT IS SO ORDERED.

Dated: August 21, 2006

CC: John W. Crimando  
Katherine L. Picard  
Brandy L. Kurelich

DONALD G. MILLER  
Circuit Court Judge

DONALD G. MILLER  
CIRCUIT JUDGE

AUG 21 2006

A TRUE COPY  
CARMELLA SABAUGH, COUNTY CLERK

BY:  Court Clerk